

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BLACKSTONE INTERNATIONAL,
LTD.,

Plaintiff,

v.

E2 LIMITED; COLLIN
CARPENTER; BIG BOX SALES &
MARKETING INC.; and
TECHNOMATE MANUFACTORY,
LTD.,

Defendants.

C20-1686 TSZ

ORDER

THIS MATTER comes before the Court on the motions to (i) dismiss Plaintiff's First Amended Complaint ("FAC"), docket no. 19-61, for lack of personal jurisdiction, or in the alternative, to compel arbitration, docket no. 24, filed by Defendant E2 Limited ("E2"); (ii) dismiss the FAC for lack of personal jurisdiction, docket no. 21, filed by Defendant Technomate Manufactory ("Technomate") and; (iii) dismiss the FAC for failure to state a claim, docket no. 22, filed by Defendant Collin Carpenter, which E2 and

1 Technomate join, docket no. 29.¹ Having reviewed all papers filed in support of, and in
2 opposition to, the motions,² the Court enters the following Order.

3 **Background**

4 **A. Factual Allegations**

5 During the last 15 years, Plaintiff Blackstone International, Ltd. (“Blackstone”), a
6 Maryland entity, has sold over three-and-a half-million product units of “lighting
7 products, mirrors, electronics, gaming products, and fans to Costco, a Washington
8 corporation,” which has “accounted for over \$200 million in revenue to Blackstone.”
9 FAC at ¶ 29. Based on the “phenomenal commercial success” of Blackstone’s products,
10 for the 2019 season “Costco agreed to pay Blackstone more than \$70 million” for the
11 purchase of more than three million units of Blackstone’s “Cascade” branded fans. *Id.* at
12 ¶¶ 34, 35. Blackstone alleges that E2, a Hong Kong entity, and Technomate, also a Hong
13 Kong entity (together, the “Corporate Defendants”), through Carpenter, a Washington
14 resident, (collectively, the “Defendants”) “covertly communicated with Costco and made
15 “false and defamatory statements” to Costco about debts that Blackstone owed to a third-
16 party entity, Mikia Lighting Corp. (“Mikia”). *Id.* at ¶¶ at 47, 50, 52. Defendants allegedly
17 sought to use these statements to “obtain an unfair competitive advantage over
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21 ¹ Defendants E2 and Carpenter also move to seal certain documents filed temporarily under seal by
22 Plaintiff Blackstone. *See* Defs. Mot. to Seal (docket no. 62). Defendants have shown good cause to do so,
23 and the Court GRANTS their motion.

² Defendant Big Box Sales & Marketing does not move to dismiss on any theory.

1 Blackstone . . . ” and to “interfere with” Blackstone’s “contracts and relationships” with
 2 Costco. *Id.* at ¶¶ 47, 52.

3 On November 2, 2018, Eric Mar, a general manager at Technomate, sent
 4 Carpenter an email asking him to help “bypass Blackstone and sell [the] tower fan to
 5 Costco through . . . [Technomate’s] agent which is you.” Ex. A6 to Huck Decl. (docket
 6 no. 52-1 at 75).³ Carpenter responded that he wanted to meet with Costco. *Id.* (docket no.
 7 52-1 at 74). In that email, Carpenter also told Mar about his pitch to Costco, which
 8 included telling Costco about the “termination in business relationship between
 9 Blackstone and Mikia.” *Id.*

10 On November 18, 2018, Carpenter met with Costco. Carpenter sent an email to
 11 Costco representatives which stated, in relevant part, that “I [Carpenter] am at Costco
 12 now in room 1159 for 4 PM meeting and will be here tomorrow, 11/20/18 for most of the
 13 day also.” Ex. A11 to Huck Decl. (docket no. 52-1 at 86). The Costco representatives
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17 ³ Defendants raise several evidentiary objections to the Huck Declaration’s admissibility. *See* E2 Repl.
 18 Br. at 6 (docket no. 68 at 8 fn. 1). The Court has reviewed these objections. The Court is not persuaded
 19 that it must determine the ultimate admissibility of the evidence because the admissibility of personal
 20 jurisdiction evidence is not clearly relevant at the motion to dismiss stage. *See, e.g., Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 561 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2860 (2015) (refusing in
 21 the context of Federal Rule of Civil Procedure 12(b)(2) motion to “address any questions regarding the
 22 ultimate admissibility of evidence”); *Philips Med. Sys. (Cleveland), Inc. v. Buan*, No. 19-CV-2648, 2021
 23 WL 83736, at *3 (N.D. Ill. Jan. 11, 2021) (same); *Citadel Inv. Grp., L.L.C. v. Citadel Cap. Co.*, 699 F.
 Supp. 2d 303, 308 (D.D.C. 2010) (stating that a plaintiff is not limited to evidence meeting standards of
 admissibility required for summary judgment motions to establish prima facie case of personal
 jurisdiction). Instead, all that is needed at this stage is a prima facie showing that the Defendants are
 subject to personal jurisdiction in this District.

1 with which Carpenter met worked in Issaquah, Washington. *See id.* at Ex. A16 (docket
2 no. 52-1 at 111.)

3 As a result of that meeting, Costco began purchasing fans from Defendants.
4 Ex. A8 to Huck Decl. (docket no. 52-1 at 81). Costco contacted Carpenter directly to
5 order these fans, and Carpenter responded with E2 and Technomate members cc'd on his
6 emails. *Id.* at Ex. A20 (docket no. 52-1 at 132). Defendants provided price quotes for
7 their fans under E2's name and shipped them with E2's name on the label. *Id.* at Ex. A21
8 (docket no. 52-1 at 141). Thus, Blackstone alleges that, because of Defendants' actions,
9 Costco ended its 15-year relationship with Blackstone and began receiving fans from
10 Defendants instead. FAC at ¶ 54.

11 Defendants did not only want Costco's business that year, however. Defendants
12 wanted a continuing relationship. As such, Defendants sought to sell Costco on their new
13 2020 Sierra Tower Fans. On March 4, 2019, Carpenter contacted Mar—with E2
14 representatives cc'd—and urged him to come from Hong Kong to Seattle to bring Costco
15 “a working sample” of Defendants' new 2020 Sierra Tower Fans. Ex. A19 to Huck Decl.
16 (docket no. 52-1 at 119). Defendants began selling Costco the Sierra Tower Fans in 2020.

17 Blackstone alleges that Defendants' 2020 Sierra Tower Fans “captured the
18 distinct, nonfunctional features” of the “Blackstone Tower Fan.” *See* FAC at ¶¶ 59–61.
19 Blackstone alleges this “capture” has created “both the likelihood of confusion and actual
20 confusion in the marketplace.” *Id.* at ¶ 60. In addition, the Defendants' Sierra Tower Fan
21 product manuals also allegedly were “the same or substantially similar to” the “text and
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1 images” in Blackstone’s product manuals. *Id.* at ¶¶ 59, 62. The “text and images” in
2 Blackstone’s manuals are protected by registered U.S. copyrights. *Id.* at ¶ 62.

3 Blackstone brings nine causes of action against all Defendants for: (i) defamation;
4 (ii) violating the Washington Consumer Protection Act, RCW § 19.86, *et. seq.* (the
5 “WCPA”); (iii) unfair competition; (iv) tortious interference; (v) violating of the Lanham
6 Act, 15 U.S.C. § 1125(a); (vi) violating the Washington Uniform Trade Secrets Act,
7 RCW 19.108.010 (the “WUTSA”); (vii) violating the Defend Trade Secrets Act,
8 18 U.S.C. § 1836 (the “DTSA”); (viii) copyright infringement; and (ix) unjust
9 enrichment.

10 **B. Procedural History**

11 Blackstone first sued in the District of Maryland, but the Maryland court
12 dismissed the case for lack of personal jurisdiction. Ex. 3 to Ludwig Decl. (docket
13 no. 25). There, the court found that E2 did not maintain offices or employees in Maryland
14 or anywhere else in the United States. *Id.* at 9. The court also found that E2 does “not
15 export or import products directly into the United States; rather, E2 delivers the [fans] to
16 Costco in Ningbo, China, where Costco takes ownership of the [fans] and exports [the
17 products] worldwide.” *Id.* The court held that the only contacts that E2 had with the
18 forum were selling and shipping the [fans] to Costco with the knowledge that the [fans]
19 would be sold by Costco to customers in the United States, including Maryland.” *Id.* at
20 17. Those contacts were not enough to confer jurisdiction in Maryland, and the court
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1 dismissed the case.⁴

2 On February 9, 2020, after the District of Maryland dismissed the case, Blackstone
3 filed this case in King County Superior Court. *See* Ex. 1 to Verification of State Court
4 Records (docket no. 19). Without naming any defendants, Blackstone sought third-party
5 discovery from Costco and Carpenter through the issuance of subpoenas. *Id.*, Exs. 5, 10,
6 11. After Costco and Carpenter supplied Plaintiff with voluminous responsive documents
7 and records, Blackstone filed its First Amended Complaint on November 10, 2020,
8 naming E2, Technomate, Carpenter, and the long-defunct Big Box Sales & Marketing as
9 defendants. *See* FAC; Ludwig Decl. at ¶¶ 9–10. Defendants removed the case to this
10 Court on November 16, 2020. *See* Notice of Removal (docket no. 1).

11 Defendants E2 and Technomate bring motions under Rule 12(b)(2) to dismiss for
12 lack of personal jurisdiction. E2 also brings a motion to compel arbitration if the Court
13 holds that it has personal jurisdiction over the parties. In response, Blackstone argues that
14 this Court has jurisdiction under the traditional test. If the Court rules that it does not
15 have jurisdiction under traditional means, then Blackstone argues that no court in the
16 United States has jurisdiction. If that is so, Blackstone argues that this Court has
17 jurisdiction under Rule 4(k)(2). Defendant Carpenter brings a motion under
18 Rule 12(b)(6) to dismiss on all counts, which Defendants E2 and Technomate join.

21 ⁴ The Maryland court concluded that personal jurisdiction was not proper in Maryland. Here, Carpenter's
22 contacts with Washington on the Corporate Defendants' behalf result in a different conclusion as to
23 specific jurisdiction in Washington. These facts were not before the Maryland court and were discovered
by the Plaintiff later.

1 Discussion

2 A. Personal Jurisdiction

3 Personal jurisdiction refers to a court’s power to render a valid and enforceable
 4 judgment against a particular defendant. *See World-Wide Volkswagen Corp. v. Woodson*,
 5 444 U.S. 286, 291 (1980); *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877), *overruled in part*
 6 *by Shaffer v. Heitner*, 433 U.S. 186, 206 (1977). The contours of that power are shaped,
 7 in large part, by the Due Process Clause of the Fourteenth Amendment, which requires
 8 sufficient “contacts, ties, or relations” between the defendant and the forum state before
 9 “mak[ing] binding a judgment in personam against an individual or corporate defendant.”
 10 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Due Process requires
 11 “‘minimum contacts’ between the defendant and the forum” to protect the defendant
 12 “against the burdens of litigating in a distant or inconvenient” court and lend “a degree of
 13 predictability to the legal system.” *World-Wide Volkswagen*, 444 U.S. at 291, 292, 297.

14 Blackstone asserts specific jurisdiction. “The inquiry whether a forum State may
 15 assert specific jurisdiction over a nonresident defendant ‘focuses on the relationship
 16 among the defendant, the forum, and the litigation.’” *Axiom Foods, Inc. v. Acerchem*
 17 *Int’l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting *Walden v. Fiore*, 571 U.S. 277,
 18 287 (2014)).

19 As to specific jurisdiction, [the Ninth Circuit] generally conduct[s] a three-
 20 part inquiry—commonly referred to as the minimum contacts test—to
 21 determine whether a defendant has sufficient contacts with the forum to
 22 warrant the court’s exercise of jurisdiction:

23 (1) The non-resident defendant must purposefully direct his activities or
 consummate some transaction with the forum or resident thereof; or perform

1 some act by which he purposefully avails himself of the privilege of
2 conducting activities in the forum, thereby invoking the benefits and
protections of its laws;

3 (2) the claim must be one which arises out of or relates to the defendant's
4 forum-related activities; and

5 (3) the exercise of jurisdiction must comport with fair play and substantial
justice, i.e. it must be reasonable.

6 *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 603 (9th Cir. 2018)
7 (internal quotation marks omitted). The plaintiff bears the burden of satisfying the first
8 two prongs. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir.
9 2011). If a plaintiff does that, then the burden of satisfying the third prong shifts to the
10 defendant to present a "compelling case" that the exercise of jurisdiction would not be
11 reasonable. *Id.* "Generally, '[t]he commission of an intentional tort in a state is a
12 purposeful act that will satisfy the first two requirements [of the minimum contacts
13 test].'" *Freestream Aircraft*, 905 F.3d at 603 (alterations in original) (quoting *Paccar*
14 *Int'l, Inc. v. Com. Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1064 (9th Cir. 1985)).

15 When the Court decides a Rule 12(b)(2) motion without an evidentiary hearing,
16 "the plaintiff need make only a prima facie showing of jurisdictional facts to withstand
17 the motion to dismiss. That is, the plaintiff need only demonstrate facts that if true would
18 support jurisdiction over the defendant." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.
19 1995) (internal citations omitted). In so doing, the Court may consider evidence outside
20 the complaint, such as affidavits, declarations, and other submitted materials. *See*
21 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). When the
22 parties' respective affidavits and/or declarations conflict, the Court must resolve all
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1 disputed facts in the plaintiff's favor. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154
2 (9th Cir. 2006).

3 The parties disagree about whether this Court has personal jurisdiction over the
4 Corporate Defendants. Blackstone argues that this Court has jurisdiction because
5 Carpenter, acting as the Corporate Defendants' agent, committed intentional torts in this
6 District. The Corporate Defendants argue that this Court does not have specific
7 jurisdiction over them because (i) an agent's actions inside of a forum cannot confer
8 specific personal jurisdiction over the principal, or (ii) if an agent's actions can confer
9 jurisdiction over the principal, then Carpenter was not the Corporate Defendants' agent.

10 **1. The Agency Theory of Specific Personal Jurisdiction**

11 Blackstone argues that it can establish jurisdiction under an agency theory. Pl.
12 Resp. Br. at 16 (docket no. 49 at 27). The Corporate Defendants argue that the agency
13 theory no longer provides a viable basis for jurisdiction. E2 and Technomate Repl. Br. at
14 6 (docket no. 68 at 8).

15 Before the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S.Ct. 746
16 (2014), the Ninth Circuit allowed a plaintiff to impute a local entity's contacts with the
17 forum state to a foreign affiliate or parent under an agency theory. *Ranza v. Nike, Inc.*,
18 793 F.3d 1059, 1071 (9th Cir. 2015). In *Daimler*, the Supreme Court specifically rejected
19 the agency theory's applicability to general jurisdiction. *See id.* (citing *Daimler*, 134
20 S. Ct. at 759). But *Daimler* specifically recognized that "[a]gency relationships . . . may
21 be relevant to the existence of specific jurisdiction. A corporation can purposefully avail
22 itself of a forum by directing its agents or distributors to take action there." *Daimler*, 134
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1 S. Ct. at 759 n.13 (emphasis added) (internal quotations omitted). Likewise, although
2 *Ranza* recognized *Daimler*’s holding, *Ranza* only applied it to general jurisdiction.
3 793 F.3d at 1071.

4 Furthermore, the concerns animating *Daimler* are not present in the specific
5 jurisdiction context. In *Daimler*, the Court rejected the Ninth Circuit’s agency theory
6 because of the concern that it would “subject foreign corporations to general jurisdiction
7 whenever they have an in-state subsidiary or affiliate[.]” 134 S. Ct. at 760–61. Unlike the
8 overly broad theory that *Daimler* rejected, specific jurisdiction requires that the
9 defendant’s agent’s contacts relate to the claim at issue; in other words, the defendant
10 will only be subject to specific jurisdiction if the plaintiff’s claim arises out of its agent’s
11 contacts. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102,
12 112 (1987) (“[D]efendant may indicate an intent or purpose to serve the market in the
13 forum state . . . [by] marketing the product through a distributor who has agreed to serve
14 as the sales agent in the forum State.”); *HaloSongs, Inc. v. Sheeran*, No. 16-CV-1062,
15 2017 WL 5198248, at *9 (C.D. Cal. Jan. 13, 2017) (holding that the agency theory of
16 specific jurisdiction survives after *Ranza*); *Herring Networks, Inc. v. AT&T Servs., Inc.*,
17 No. 16-CV-01636, 2016 WL 4055636, at *7–8 (C.D. Cal. July 25, 2016) (analyzing
18 whether plaintiff’s claims “arise out of or relate to” the contacts of defendant’s agents);
19 *Weaver v. Johnson & Johnson, Ethicon, Inc.*, No. 16-CV-00257, 2016 WL 1668749, at
20 *5 (S.D. Cal. Apr. 27, 2016) (“A parent corporation may be amenable to specific
21 jurisdiction in a forum state, through an agency relationship . . .”) (citing *Daimler*, 134
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1 S. Ct. at 759 n.13; and *Ranza*, 793 F.3d at 1075).⁵ In sum, the Court holds that agency
2 can still provide a basis for specific jurisdiction.

3 **2. Carpenter as the Corporate Defendants’ Agent**

4 Given the Ninth Circuit’s guidance in *Freestream Aircraft*, the threshold question
5 is whether part of the alleged tortious conduct occurred in Washington.⁶ If so, the *Paccar*
6 purposeful availment analysis is appropriate. *See Freestream Aircraft*, 905 F.3d at 606.
7 Blackstone’s theory in that regard is that Carpenter acted as the Corporate Defendants’
8 agent. If Carpenter indeed acted as the Corporate Defendants’ agent, then Blackstone has
9 alleged facts sufficient to support specific jurisdiction over the Corporate Defendants.⁷

10 The Court has little difficulty concluding that Plaintiff’s allegations about the
11 Defendants’ conduct establish a prima facie case that Carpenter acted as the Corporate
12 Defendants’ agent in Washington. Blackstone alleges that Carpenter held meetings in
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14 ⁵ The Corporate Defendants contend that the agency theory is no longer viable for specific jurisdiction.
15 E2 and Technomate Repl. Br. at 7 (docket no. 68 at 7). They argue that *Walden v. Fiore*, 134 S. Ct. 115
16 (2014) expanded *Daimler*’s holding. *Id.* at 11, 13 (docket no. 68 at 13, 15). They rely on the opinion’s
17 requirement that the relationship between the defendant, plaintiff, and the forum state “must arise out of
18 contacts that the ‘defendant himself’ creates with the forum State.” *Walden*, 134 S. Ct. at 1122 (emphasis
19 in original, quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985)). But this statement cannot refer
20 to the agency theory because the quoted case—*Burger King*—predates *Daimler*. And *Walden* then cites
21 numerous cases that show the Supreme Court’s focus is unrelated third parties—not agents. *See id.* at
22 1122 (citing cases that do not involve agency relationships). Furthermore, *Walden* also states that
23 “physical entry into the State—either by the defendant in person or through an agent, goods, mail, or
some other means—is certainly a relevant contact.” *Id.* at 1123 (emphasis added).

⁶ Because Blackstone need only make a prima facie case that one intentional tort occurred in the state of
Washington, the Court analyzes whether the factual allegations involving the alleged defamatory and/or
tortiously interfering conduct support personal jurisdiction.

⁷The Court notes that the Corporate Defendants seem to agree that, if Carpenter acted as their agent, then
his conduct occurred in Washington. *See* E2 and Technomate Repl. Br. at 9 (docket no. 68 at 11)
 (“Without being able to attribute Carpenter’s forum-related activities to Technomate and E2, Blackstone
cannot satisfy purposeful availment . . . as to either Defendant.”).

1 Washington with Costco on the Corporate Defendants’ behalf, with the Corporate
2 Defendants’ knowledge. *See* Exs. A11, A16 to Huck Decl. (docket no. 52-1); *see also id.*
3 at Ex. A6 (docket no. 52-1 at 75) (asking Carpenter to help “bypass Blackstone and sell
4 . . . tower fan[s] to Costco through . . . [Technomate’s] agent which is you”); FAC at
5 ¶¶ 50–51.

6 If Blackstone proves these allegations, then these facts support a finding that an
7 agency agreement existed (actual agency) or that Defendants’ collective conduct or
8 statements caused Costco to reasonably believe that an agency relationship existed
9 (apparent agency); *In re Park W. Galleries, Inc., Mktg. & Sales Pracs. Litig.*, No. 09-CV-
10 2076, 2010 WL 2640249, at *10 (W.D. Wash. June 25, 2010); *see Herring Networks,*
11 *Inc.*, 2016 WL 4055636, at *7–8. The Court holds that it has personal jurisdiction over
12 the Corporate Defendants, and E2’s and Technomate’s motions to dismiss for lack of
13 personal jurisdiction therefore are DENIED.

14 **3. E2’s Arbitration Request**

15 In the alternative, E2 asks the Court to compel arbitration. It cannot do so. The
16 arbitrator found that the claims at issue in this case are not arbitrable. *See* docket no. 90 at
17 36. This Court finds no reason to set aside the arbitrator’s determination. E2’s motion to
18 compel arbitration is therefore DENIED.

19 **B. Motion to Dismiss**

20 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
21 provide detailed factual allegations, it must offer “more than labels and conclusions” and
22 contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl.*
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1 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than
 2 mere speculation of a right to relief. *Id.* When a complaint fails to adequately state a
 3 claim, such deficiency should be “exposed at the point of minimum expenditure of time
 4 and money by the parties and the court.” *Id.* at 558. A complaint may be lacking for one
 5 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
 6 cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th
 7 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
 8 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. *Usher v.*
 9 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is
 10 whether the facts in the complaint sufficiently state a “plausible” ground for relief.
 11 *Twombly*, 550 U.S. at 570. If the Court considers matters outside the complaint, it must
 12 convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court
 13 dismisses the complaint or portions thereof, it must consider whether to grant leave to
 14 amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).⁸

15 **1. Defamation**

16 To establish trade libel or defamation, a plaintiff must show “falsity, an
 17 unprivileged communication, fault, and damages.” *See, e.g., Mohr v. Grant*, 153 Wn.2d
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 20 ⁸ Throughout the motion papers, Defendants make an argument that Blackstone has engaged in improper
 21 group-pleading. The Court finds this argument unpersuasive. Plaintiff pleads all causes of action against
 22 all Defendants unless the FAC expresses otherwise. FAC at ¶ 1; *see ITT Enidine Inc. v. Gen. Aerospace,*
 23 *Inc.*, No. C18-1108, 2019 WL 4007331, at *2 (W.D. Wash. Apr. 8, 2019) (concluding that plaintiff did
 not engage in group pleading where the operative complaint defined a term to include the relevant
 defendants).

812, 822, 108 P.3d 768 (2005). Defendants contend that Blackstone has not pled falsity with enough specificity, or in the alternate, that the statements Carpenter made were true.⁹ Defendants are incorrect as to the sufficiency of Blackstone’s pleading, and Defendants misunderstand the standard on a motion to dismiss.

Regarding the Complaint’s sufficiency, “a plaintiff need only plead enough fact[s] to raise a reasonable expectation that discovery will reveal that the defendant is liable” on a motion to dismiss. *ITT*, 2019 WL 4007331, at *2 (internal quotation marks omitted). Blackstone has done so. Blackstone specifically alleges that Carpenter’s “representations” to Costco when acting as the Corporate Defendant’s behalf “regarding monies allegedly owed by Blackstone to Mikia were false.” FAC at ¶¶ 47, 50, 51. That level of specificity is sufficient to allege falsity. *See ITT*, 2019 WL 4007331, at *2 (internal quotation marks omitted).

Next, Defendants argue Carpenter’s statements were true, and that truth is the ultimate defense to defamation. Defendants are correct—at the summary judgment stage. In fact, Defendants’ authority in support of their argument all comes from that procedural posture.¹⁰ On a motion to dismiss, however, the Court must assume the truth of the

⁹ Defendants ask this Court to take judicial notice of both Blackstone’s complaint and the decision in Blackstone’s prior case against E2 in the District of Maryland. *See* docket no. 28. The Court takes judicial notice of these documents’ existence and considers them in its ruling, *see Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005), but does not accept their assertions as true.

¹⁰ *See Emmanuel v. King Cty.*, No. C18-0377, 2020 WL 4922206 (W.D. Wash. Aug. 21, 2020) (on summary judgment); *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005) (same); *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989) (same).

1 plaintiff's allegations and draw all reasonable inferences in the plaintiff's favor. *Usher*,
2 828 F.2d at 561. Applying this standard yields only one result—Blackstone has met its
3 burden. Defendants' motion to dismiss Plaintiff's first cause of action therefore is
4 DENIED.

5 **2. The WCPA**

6 To establish a violation of the WCPA, a private plaintiff must prove: (i) the
7 defendant engaged in an unfair or deceptive act or practice; (ii) such act or practice
8 occurred within a trade or business; (iii) such act or practice affected the public interest;
9 (iv) the plaintiff suffered an injury to his or her business or property; and (v) a causal
10 relationship exists between the defendant's act or practice and the plaintiff's injury.
11 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785–93,
12 719 P.2d 531 (1986). Whether conduct constitutes an unfair or deceptive trade practice
13 within the meaning of the CPA constitutes a question of law. *Robinson v. Avis Rent A*
14 *Car Sys., Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001). To qualify, the alleged act
15 must have had the “capacity to deceive a substantial portion of the public.” *Hangman*
16 *Ridge*, 105 Wn.2d at 785. Defendants argue that the alleged act or practice in this case
17 did not affect the public interest. Defendants are correct.

18 The predicate to Blackstone's current WCPA claim concerns no more than alleged
19 business-to-business defamation and tortious interference with a contract, which does not
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1 affect the public interest.¹¹ Plaintiff alleges no facts that others have been or will be
2 injured in exactly the same fashion. *See Sloan v. Thompson*, 128 Wn. App. 776, 792, 115
3 P.3d 1009 (2005) (“[I]t is the likelihood that additional plaintiffs have been or will be
4 injured in exactly the same fashion that changes the factual pattern from a private dispute
5 to one that affects the public interest.” (quoting *Hangman Ridge*, 105 Wn.2d at 790–91)).
6 Defendants’ motion to dismiss therefore is GRANTED without prejudice and with leave
7 to amend.

8 **3. Unfair Competition**

9 Blackstone argues that its unfair competition claim survives for the same reasons
10 that its Lanham Act claim survives. As discussed below, Blackstone’s Lanham Act claim
11 fails. Thus, Blackstone’s unfair competition claim fails for the same reasons that its
12 Lanham Act claim fails. Defendants’ motion as to the unfair competition claim is
13 GRANTED without prejudice and with leave to amend.

14 **4. Tortious Interference**

15 To establish tortious interference with a contractual relationship or business
16 expectancy, a plaintiff must prove (i) the existence of a valid contractual relationship or
17 business expectancy; (ii) the defendant’s knowledge of that relationship, (iii) an
18 intentional interference inducing or causing a breach or termination of the relationship or
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21 ¹¹ Blackstone argues that its Lanham Act claim also provides a predicate for this claim in that it
22 establishes a public harm. Pl. Resp. Br. at 16 (docket no. 53 at 17). If that claim survived, then Blackstone
23 might be able to allege a public harm. That claim fails, however. As such, this Court does reach
Blackstone’s arguments regarding its Lanham Act claim.

1 expectancy, (iv) the defendant's interference had an improper purpose or used an
2 improper means, and (v) resultant damage. *Leingang v. Pierce Cnty. Med. Bureau, Inc.*,
3 131 Wn.2d 133, 157, 930 P.2d 288 (1997). "Exercising in good faith one's legal interests
4 is not improper interference." *Id.* The Defendants argue only that Blackstone has not
5 satisfied the fourth part of the test, specifically whether Defendants used "improper
6 means" when interfering with Blackstone's contract with Costco. *See* Carpenter Repl. Br.
7 at 12 (docket no. 72 at 13). The Court concludes that Blackstone has alleged facts that
8 satisfy its burden.

9 Defendants contend that this cause of action is predicated on Blackstone's trade
10 secrets claim and therefore rises or falls based on the outcome of that cause of action.
11 Said differently, Defendants say that Blackstone's only basis for alleging "improper
12 means" is the alleged misappropriation of trade secrets. As such, Defendants also argue
13 that Blackstone's tortious interference claim is preempted by the WUTSA.¹² But
14 Defendants arguments are incorrect for the same reason—this cause of action survives
15 because of its relationship to the defamation cause of action, not because of its
16 relationship to Blackstone's trade secrets allegation. Here, Blackstone has plausibly
17 alleged that Carpenter, as the Corporate Defendants' agent, defamed Blackstone to
18 Costco. FAC at ¶¶ at 47, 50, 52. That conduct satisfies the fourth step in Washington's
19 test for tortious interference. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th
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22 ¹² The Court does not reach the merits of Defendants' preemption argument because Blackstone's claim
23 survives on independent grounds.

1 Cir. 1990) (addressing defamation as a predicate claim that satisfies tortious
 2 interference’s “improper means” element). Defendants’ motion to dismiss the tortious
 3 interference claim therefore is DENIED.

4 **5. The Lanham Act**

5 “The Lanham Act provides for the registration of trademarks, which it defines in
 6 § 45 to include ‘any word, name, symbol, or device, or any combination thereof [used or
 7 intended to be used] to identify and distinguish [a producer’s] goods . . . from those
 8 manufactured or sold by others and to indicate the source of the goods’” *Wal-Mart*
 9 *Stores v. Samara Bros.*, 529 U.S. 205, 209 (2000) (quoting 15 U.S.C. § 1127). “In
 10 addition to protecting registered marks, the Lanham Act, in § 43(a), gives a producer a
 11 cause of action for the use by any person of ‘any word, term, name, symbol, or device, or
 12 any combination thereof . . . which . . . is likely to cause confusion . . . as to the origin,
 13 sponsorship, or approval of his or her goods’” *Id.* (quoting 15 U.S.C. § 1125(a)). In
 14 some cases, the packaging, “or ‘dressing,’ of a product” might also be actionable under
 15 § 43(a). *Id.* By comparison, the design of a product, itself, is not inherently distinctive
 16 and will not form the basis of an infringement claim, without more. *Id.* at 212. Thus, “in
 17 an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a
 18 product’s design is distinctive, and therefore protectible, only upon a showing of
 19 secondary meaning.” *Id.* at 216.

20 Because Blackstone has no registered trade dress, it must meet the test that the
 21 Ninth Circuit has laid out for unregistered trade dress claims. “To prove infringement of
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an unregistered trade dress, a plaintiff must demonstrate that (1) the trade dress is nonfunctional, (2) the trade dress has acquired secondary meaning, and (3) there is a substantial likelihood of confusion between the plaintiff's and defendant's products." *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 754 (9th Cir. 2018). Blackstone's Lanham Act claim fails on the second prong of this test.

Blackstone does not plead that its alleged trade dress has any secondary meaning or acquired distinctiveness. Instead, Blackstone simply asserts that its product is "distinctive," and says no more on the matter. FAC at ¶¶ 61, 102–104. That conclusory allegation, by itself, is not enough to survive a motion to dismiss. Instead, "to establish secondary meaning, [Blackstone] must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." *Sazerac Co., Inc. v. Fetzer Vineyards, Inc.*, 265 F. Supp. 3d 1013, 1033 (N.D. Cal. 2017), *aff'd*, 786 F. App'x 662 (9th Cir. 2019) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982)). Blackstone has not alleged that the public places "primary significance" on the source of the fans and not the fans themselves. Blackstone's Lanham Act claim therefore fails. Defendants' motion as to the Lanham Act claim therefore is GRANTED without prejudice and with leave to amend.

6. The WUTSA and DTSA¹³

¹³ The parties (and the Court) agree that the WUTSA and DTSA claims require the same showing so the Court will address them together.

1 A party asserting a trade secret claim bears the burden of “proving that legally
2 protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665
3 (1987). The Washington Uniform Trade Secrets Act defines a trade secret as information
4 that has independent economic value, is not generally known, and is the subject of
5 reasonable efforts to maintain its secrecy. RCW 19.108.010(4). For trade secrets to exist,
6 they must not be “readily ascertainable by proper means” from some other source,
7 including the product itself. RCW 19.108.010(4)(a). A “vague description” of the product
8 at issue without identification of what components are protected by trade secrets is
9 insufficient to survive a motion to dismiss. *Baden Sports, Inc. v. Wilson Sporting Goods*
10 *Co.*, No. C11-0603, 2011 WL 3158607, at *2 (W.D. Wash. July 26, 2011) (pleadings are
11 not adequate to survive a Rule 12(b)(6) motion when a party does not specify in its
12 complaint which components, or combination of components, of a device are protected
13 trade secrets). Defendants argue that Blackstone does not allege its trade secrets with
14 sufficient particularity. This Court agrees.

15 In support of its trade secrets claims, Blackstone alleges only that its “unique
16 methods and processes, proprietary modeling and formulas, and valuable and exclusive
17 know-how were trade secrets.” FAC at ¶ 107. Blackstone also refers to its “marketing of
18 the Blackstone Tower Fan and Blackstone Personal Fan,” *Id.* at ¶ 32, and “confidential
19 information regarding Blackstone’s business relationship with Costco, DCI/Home Star,
20 and Mikia, including without limitation the 2019 Fan Program Agreement and
21 Blackstone’s purchase orders for the Blackstone Tower Fans.” *Id.* at ¶ 56. Blackstone’s
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position essentially is that a list of nouns, without further description, and a set of contracts, without more, amount to protectable trade secrets.

The indeterminacy of Blackstone’s list sinks its claim. It does not “identify the trade secret “with sufficient particularity . . . to permit the defendant to ascertain at least the boundaries within which the secret lies.” *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d 1169, 1178 (W.D. Wash. 2019). Instead, Blackstone paints with too broad a brush. Blackstone asks this Court to believe that, somewhere inside of its “unique methods and process,” there lies a trade secret. The Court will not do so because Blackstone’s allegations are a “vague description” of the product at issue, and Blackstone does not identify what components are protected by trade secrets. *Baden Sports*, 2011 WL 3158607, at *2.¹⁴ Defendants’ motion to dismiss the WUTSA and DTSA claims are GRANTED without prejudice and with leave to amend.

7. Copyright Infringement

“To establish a prima facie case of copyright infringement, a plaintiff must show (1) ownership of a valid copyright and (2) violation by the alleged infringer of at least one of the exclusive rights granted to copyright owners by the Copyright Act[.]” *UMG*

¹⁴ Assuming for the sake of argument that the items that Blackstone lists are determinate, Blackstone has not explained how it keeps these items secret. Blackstone has not alleged that they make Costco or Mikia sign non-disclosure agreements or take any other protective measures when they view the 2019 Fan Program Agreement or take purchase orders. Blackstone does not explain how it protects its “proprietary pricing formulas,” “unique methods and processes,” or its “marketing strategy.” Blackstone also has not sufficiently alleged how these items’ secrecy provide Blackstone with an economic advantage. In sum, Blackstone’s trade secrets claims are wholly deficient.

1 *Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1178 (9th Cir. 2011); 17 U.S.C. § 501. The
2 Copyright Act provides for various theories of liability, including direct infringement,
3 contributory infringement, and vicarious infringement. 3 *Nimmer on Copyright* § 12.04
4 (2020).

5 The parties do not contest that Blackstone owned a valid copyright. Instead,
6 Defendant Carpenter offers reasons as to why he is not liable under this cause of action
7 for any theory of infringement. Notably, and in contrast to Carpenter, the Corporate
8 Defendants make no arguments on their own behalf. *See* Carpenter Mot. to Dismiss
9 (docket no. 22 at 17–18). As such, the motion is ambiguous as to whether the Corporate
10 Defendants move to dismiss Blackstone’s copyright claim. The Court assumes that the
11 Corporate Defendants join Carpenter’s motion. Because only Carpenter provides
12 substantive argument on this cause of action, the Court addresses only the merits of his
13 arguments.

14 **a. Direct Infringement**

15 Under the theory of direct infringement, Carpenter argues that he did not engage in
16 the “volitional conduct” that the Ninth Circuit requires. *See Perfect 10, Inc. v. Giganews,*
17 *Inc.*, 847 F.3d 657 (9th Cir. 2017). In *Giganews*, the Ninth Circuit clarified several
18 bedrock aspects of copyright infringement liability. *See generally id.* Most relevant to
19 Blackstone’s direct infringement claims against Carpenter, the Ninth Circuit confirmed
20 that direct copyright infringement has a causation component, often referred to as
21 “volitional conduct,” that a plaintiff must prove. *Id.* at 666. “‘Volition’ in this context
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1 does not really mean an ‘act of willing or choosing’ or an ‘act of deciding,’” *Id.*
2 (quoting *Volition*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986)).
3 “Rather, . . . it ‘simply stands for the unremarkable proposition that proximate causation
4 historically underlines copyright infringement liability no less than other torts.’” *Id.*
5 (quoting 4 *Nimmer on Copyright* § 13.08(c)(1) (2016) (Matthew Bender, Rev. Ed.)).

6 Here, Blackstone’s allegations against Carpenter clear that bar. Blackstone alleges
7 that “Defendants manufactured, imported, distributed, and/or sold” the Sierra Tower Fan
8 to Costco. FAC at ¶ 59. Blackstone also alleges that the Sierra Tower Fan that
9 Defendants sold to Costco included a “user manual,” which infringed on Blackstone’s
10 registered copyrights through the inclusion of protected “text and images.” *Id.* at ¶¶ 59,
11 62. To succeed, Blackstone had “to demonstrate . . . some evidence showing [Carpenter]
12 exercised control (other than by general operation . . .); selected any material for upload,
13 download, transmission, or storage; or instigated any copying, storage, or distribution of
14 [the offending material].” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir.
15 2019). Blackstone has done so. It has alleged that Carpenter at least instigated the
16 distribution and sale of the offending material. FAC at ¶¶ 53, 54. The “nexus” that
17 Blackstone alleges is “sufficiently close and causal to the illegal copying that one could
18 conclude that” Carpenter “himself trespassed on the exclusive domain of the copyright
19 owner.” *Id.* Said in the hornbook language of proximate cause, it was reasonably
20 foreseeable that Carpenter’s actions would result in copyright infringement. For these
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1 reasons, the Court DENIES Defendants’ motion as to Blackstone’s theory of direct
2 copyright infringement.

3 **b. Contributory Infringement**

4 Contributory infringement originates in tort law and stems from the notion that
5 one who directly contributes to another’s infringement should be held accountable. *See*
6 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In other words,
7 the common law doctrine that one who knowingly participates in or furthers a tortious act
8 is jointly and severally liable with the prime tortfeasor is applicable under copyright
9 law.¹⁵

10 Here, Blackstone alleges that Carpenter knew of the Blackstone’s Copyrights
11 “through E2.” FAC ¶ 63. Blackstone also alleges that a cease-and-desist letter that it sent
12 to E2 provided Carpenter with knowledge of the alleged copyright infringement. *Id.* at
13 ¶ 64. That letter told E2 to, in relevant part, “[c]ease and desist from all unauthorized use
14 of Blackstone Intellectual Property, including . . . ceasing the manufacture, distribution,
15 sale and/or sale for importation of the Sierra Tower Fan . . . or any products confusingly
16 similar to the Blackstone Products.” These allegations, coupled with Carpenter’s active
17 participation in the distribution of the fans, adequately aver that Carpenter knowingly
18 participated in the infringing activity. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d
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20 ¹⁵ The classic statement of the doctrine is in *Gershwin Publishing Corp. v. Columbia Artists Management,*
21 *Inc.*: “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to
22 the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” 443 F.2d 1159, 1162
(2d Cir. 1971); *see also Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 975 (9th Cir.
23 1981), *rev’d on other grounds*, 464 U.S. 417 (1984) (adopting *Gershwin* in this circuit).

259, 261 (9th Cir. 1996) (reversing dismissal where a swap-meet organizer facilitated the sale of bootleg records by third-party vendors and benefitted from the sale of the bootlegged works). For these reasons, the Court DENIES Defendants’ motion as to Blackstone’s theory of contributory copyright infringement.

c. Vicarious Copyright Infringement

The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondeat superior. *See Fonovisa*, 76 F.3d at 261–62. “To state a claim for vicarious copyright infringement, a plaintiff must allege that the defendant has (i) the right and ability to supervise the infringing conduct and (ii) a direct financial interest in the infringing activity.” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007). Carpenter does not employ the Corporate Defendants, so this theory may be inapplicable to his behavior. Said differently, Blackstone does not allege that Carpenter had the “right and ability to *supervise* the infringing conduct.” *Id.* (emphasis added). For these reasons, the Court GRANTS Carpenter’s motion as to Blackstone’s theory of vicarious copyright infringement without prejudice and with leave to amend. The Court DENIES E2’s and Technomate’s motion for the same.

8. Unjust Enrichment

“Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wash.2d 477, 484, 191 P.3d 1258 (2008).

1 Three elements must be established in order to sustain a claim based on unjust
2 enrichment: a benefit conferred upon the defendant by the plaintiff; an
3 appreciation or knowledge by the defendant of the benefit; and the acceptance
4 or retention by the defendant of the benefit under such circumstances as to make
5 it inequitable for the defendant to retain the benefit without the payment of its
6 value.

7 *Id.* (internal citations omitted). In this case, Blackstone’s allegation that “Defendants
8 received the benefit of the sales of Blackstone’s products . . . ,” FAC at ¶ 133, is merely a
9 conclusion and is not enough to satisfy the first prong of the test. As such, Blackstone
10 fails to adequately plead this cause of action. Defendants motion as to unjust enrichment
11 is therefore GRANTED without prejudice and with leave to amend.

12 **Conclusion**

13 For the foregoing reasons, the Court ORDERS:

14 (1) E2’s and Technomate’s motions to dismiss the FAC under Rule 12(b)(2)
15 for lack of personal jurisdiction, docket nos. 21 and 24, are DENIED.

16 (2) E2’s alternative request to compel arbitration is DENIED.

17 (3) Defendants’ motions to dismiss the FAC under Rule 12(b)(6) for failure to
18 state a claim, docket nos. 22 and 29, are GRANTED in part and DENIED in part, as
19 follows:

20 a. The motions are GRANTED as they relate to Count II (violation of
21 WCPA), Count III (unfair competition), Count V (violation of the Lanham Act),
22 Count VI (violation of the WUTSA), Count VII (violation of the DTSA), Count
23 VIII (copyright infringement) on the theory of vicarious infringement as to

1 Defendant Carpenter, and Count IX (unjust enrichment), and these claims are
2 DISMISSED without prejudice and with leave to amend.

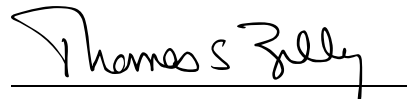
3 b. The motions are DENIED as they relate to Count I (defamation),
4 Count IV (tortious interference). As to Count VIII (copyright infringement),
5 Carpenter's motion as to the theories of direct and contributory infringement are
6 DENIED, and E2's and Technomate's motions are DENIED in their entirety.

7 (4) Defendant E2's and Carpenter's motion to seal, docket no. 62, is
8 GRANTED, and Blackstone's filings in docket nos. 49 and 52 shall remain under seal.

9 (5) Any amended pleading shall be filed within thirty (30) days of this Order.
10 Any responsive pleading or motion shall be filed within thirty (30) days thereafter.

11 (6) The Clerk is directed to send a copy of this Order to all counsel of record.
12 IT IS SO ORDERED.

13 Dated this 31st day of October, 2022.

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16 Thomas S. Zilly
17 United States District Judge
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